

August 18, 2005

Civil Division-Kent County (739-7641)

Mr. William B. Chandler, III
600 Main Street
P.O. Box 87
Dagsboro, DE 19939

Re: **Freedom of Information Act Complaint
Against Town of Dagsboro**

Dear Mr. Chandler:

Our Office received your complaint on July 28, 2005 alleging that the Town of Dagsboro ("the Town") violated the Freedom of Information Act, 29 *Del. C.* Chapter 100, by: (1) failing to notice in the agenda for a meeting held on May 23, 2005 that after executive session the Town Council would return to public session to vote on several matters of public business; (2) meeting in executive session on May 23, 2005 to discuss matters of public business for purposes not authorized by law; and (3) denying you access to the complete minutes of the executive session held on May 23, 2005.¹

¹As the Chancellor of the Chancery Court, we would normally address you as "Your Honor." You made it clear when you filed your complaint with our Office, however, that you were acting as "a resident of the Town of Dagsboro."

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By letter dated July 29, 2005, we asked the Town to respond to your complaint by August 5, 2005 and to "provide us with a copy of the notice, agenda, and the minutes for the meeting held on May 23, 2005, including the minutes of any executive session which we will review *in camera* and treat confidentially." We received the Town's response on August 5, 2005 together with the documents we requested.

In its response, the Town did not address your complaint about the sufficiency of the agenda for the May 23, 2005 meeting. You are correct "that there is no reference on the public agenda that there would be a return from the executive session to a regular public session for action to be taken on any public business." You contend that the agenda did not comply with the notice requirements of FOIA because members of the public "had no way of knowing . . . that the Town Council would reconvene *after* the executive session. As a result, on information and belief, there were no members of the public present to hear the discussion and vote regarding the certificate of compliance procedure."

Your complaint alleges that the Town Council discussed matters of public business in executive session on May 23, 2005 which FOIA did not authorize for private discussion, based on your review of a redacted copy of the draft minutes the Town provided you in response to a public records request. According to you, "[t]he redacted minutes reflect a discussion regarding the procedure followed by the Town of Dagsboro when issuing 'zoning responses' to residents and property owners in the town." The redacted minutes also show that the Council discussed a number of other matters (personnel; contracts; proposed town hall; tax collection; and personnel policy handbook) which you contend FOIA did not authorize for private discussion.

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According to the Town, the Council "properly discussed all of these matters in executive session as relating to protected subjects. Personnel matters related to the competency of individuals. Furthermore, there was no action or discussion on the CEA-DAG agreement,² Artesian Agreement, or the Personnel Policy Handbook. The two agreements have been in negotiation over a long period of time with a final contract expected to be presented to the Council for public discussion in August."

In response to your initial request for a copy of the minutes of the May 23, 2005 executive session, the Town provided you with a redacted version. The redacted version³ includes the text of the minutes for the first matter discussed ("Town Clerk/Town Manager actions") and the text of the last matter discussed ("Personnel Policy Handbook"), but only the headings for the other six matters discussed in executive session ("Artesian"; "CEA-DAG"; "Individual personnel matter"; "Proposed town hall"; "Individual personnel matter"; and "Tax collections").

By letter dated July 6, 2005, you requested a copy of the complete minutes of the May 23, 2005 executive session. The Town has not honored your request claiming that "most of the executive session discussion agenda must remain confidential at this point."

² You explained that "CEA-DAG" refers to a local apartment complex.

³ At the time of your public records request, the minutes of the Town Council's May 23, 2005 executive session were still in "draft" form. At a meeting on July 25, 2005, the Council approved the minutes of the May 23, 2005 executive session with only minor changes.

Relevant Statutes

FOIA requires all public bodies to "give public notice of their regular meetings and of their intent to hold an executive session to the public, at least 7 days in advance thereof. The notice shall include the agenda," 29 *Del C.* §10004(e)(2). An "agenda" is defined as "a general statement of the major issues to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefor under subsection (b) of Section 10004 of this title." *Id.* §10001(f).

FOIA requires that every meeting of a public body "shall be open to the public except those closed" for executive session as authorized by law. *Id.* §10004(a).

FOIA authorizes a public body to meet in executive session to discuss nine subject matters, including "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open." *Id.* §10004(b)(9).

FOIA requires every public body to "maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record." *Id.* §10004(c). FOIA provides that the minutes of an executive session "and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but not longer." *Id.*

Legal Authority

A. Agenda for the May 23, 2005 Meeting

The agenda for the May 23, 2005 meeting of the Town Council listed as the last matter of business: "Executive Session. 1. Consideration of contract for operator services with Artesian Water Co. 2. Consideration of water use agreement with Cea-Dag Ent. 3. Acquisition of property and personnel. 4. Potential Litigation. 5. Status of Delinquent Taxes. 6. Personnel – Handbook."

In our experience, many public bodies schedule their executive sessions at the start or end of a public meeting so as not to keep the public waiting while the body privately discusses matters authorized by FOIA. If the last item on the agenda is an executive session, when the public body comes out of executive session the only proper course is to adjourn the meeting. Members of the public can reasonably expect that the meeting will conclude immediately after the executive session, and they can go home rather than waiting just to observe the adjournment motion in public session.

The Town Council did not adjourn the meeting after it returned from executive session on May 23, 2005. The public session minutes show that at 8:15 p.m. "Council member Czapp made a motion to enter into Executive Session" and the motion carried. The public session minutes show that the Council "re-enter[ed] regular session" at 9:52 p.m. The Council then approved two motions: (1) "to allow the town clerk and town manager to issue zoning letters to anyone that may request them"; and (2) "to limit the agenda items to a maximum of two presentations and two public hearings per Council meeting." At 9:55 p.m. the Council voted to adjourn the meeting.

"'An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.'" *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003)

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(quoting *Att'y Gen. Op. IB20* (Oct. 20, 1997)). The agenda for the Town Council's meeting on May 23, 2005 did not inform the public that the Council would discuss and vote on two items of public business after it held an executive session: (1) to authorize the town clerk and town manager to issue zoning letters; and (2) to limit agenda items to a maximum of two presentations and two hearings per Council meeting. *See Att'y Gen. Op. 02-IB17* (Aug. 6, 2002) (under FOIA, the public has a right "to observe the discussion of any public business that follows" an executive session). We determine that the Town violated the public notice requirements of FOIA by failing to disclose two matters of public business in the agenda for the May 23, 2005 meeting, which the Town Council discussed after it came out of executive session.

B. Purposes for the May 23, 2005 Executive Session

We have reviewed *in camera* the minutes of the May 23, 2005 executive session.⁴ The Town Council discussed eight matters:

1. Town Clerk/Town Manager actions.
2. Artesian.
3. CEA-DAG.
4. Individual personnel matter.
5. Proposed Town Hall.
6. Individual personnel matter.
7. Tax collections.
8. Personnel Policy Handbook.

"A public body bears the 'burden of proving that its action was justified when the propriety of an executive session is challenged.'" *Att'y Gen. Op.* 97-IB14 (July 29, 1997) (quoting *Common Cause of Delaware v. Red Clay Consolidated School District Board of Education*, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1995) (Balick, V.C.) (citing 29 *Del. C.* §10005(c)).

Based on our *in camera* review of the minutes of the May 23, 2005 executive session, we are satisfied that the Town has met its burden with regard to items 4 and 6. Those individual personnel matters were proper subjects for executive session because the discussion involved "the names, competency and abilities of individual employees." 29 *Del. C.* §10004(b)(9). We do not find that the Town has met its burden with regard to any of the other matters discussed in executive session because they do not fit within any of the exemptions under Section 10004(b) of FOIA.

1. Town Clerk/Town Manager Actions

⁴ When we refer to minutes of an executive session provided to us *in camera*, we are careful not to disclose any substantive information that FOIA authorizes for private discussion. For matters not authorized for executive session, however, any portions of the minutes reflecting discussion of those matters is not protected under FOIA, and we feel free to refer to those portions of the minutes in greater detail.

The minutes of the May 23, 2005 executive session show that the Town Council discussed your "challenge" to the Town's procedures for issuing zoning variances. According to the minutes, your challenge (a proposed ordinance to regulate certificates of compliance for restaurants) might lead to "potential litigation," so the Council believed it could lawfully discuss this matter in executive session.

FOIA limits the kinds of legal matters a public body can discuss in executive session to "strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body." 29 *Del. C. §10004(b)(4)*. These limitations were designed "to prevent potential abuse" and do not permit a public body "to hold an executive session to receive legal advice about *any* issue or matter." *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, C.A. No. 1216-K, 1994 WL 274295, at p.11 (Del. Ch., May 18, 1994) (Jacobs, V.C.) (emphasis in the original).

We have previously determined that "the potential litigation exception for executive session applies only when there is a realistic or tangible threat of litigation based on objective factors. Some indicia of such a situation might include a written demand letter, notice of intent to sue, or previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims." *Att'y Gen. Op.* 02-IB12 (May 21, 2002).

There is nothing in the record to suggest that, prior to May 23, 2005, the Town had any realistic or tangible threat of litigation from you based on objective factors. In a letter dated May 19, 2005 to the Mayor, you asked the Town to "amend its Municipal Code to include a formal, public

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procedure for restaurants to obtain from the Town a 'certificate of compliance' (as required by certain regulatory agencies such as the Delaware Alcoholic Beverage Control Commission ('ABCC')) showing that a restaurant business in Town has appropriate zoning, business license, property tax, parking and other necessary licenses and permits required by the Town." The minutes of the May 23, 2005 executive session do not reflect any discussion of legal strategy in the event of potential litigation over your proposed certificate of compliance ordinance. The Town Council merely asked the Town Clerk and the Town Manager about their current responsibilities and procedures regarding compliance issues.

Under FOIA, a public body has the burden of proof "to justify a decision to meet in executive session." 29 *Del. C.* §10005(c). We determine that the Town has not met its burden of proof to justify meeting in executive session on May 23, 2005 to discuss the Town Clerk's and the Town Manager's responsibilities and operating procedures regarding compliance issues. zoning inquiries.

2. Contracts

The minutes of the May 23, 2005 executive session show that the Town Council heard a report from the Town Solicitor about the status of two contracts: water hookup charges for an apartment complex (CEA-DAG); and water supply by Artesian Water Company.

In its response to your complaint, the Town contends that it did not violate FOIA because "there was no action or discussion of the CEA-DAG Agreement [or the] Artesian Agreement." The minutes of the executive session prove that there was discussion of both contracts.⁵ The public meeting requirements of FOIA do not turn on whether a public body took official action. Otherwise, "there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business so long as the Board reached no formal decision at that private meeting. Such a construction ignores the statement in §10001 that citizens have the right to monitor decisions of public officials in formulating public policy and the requirement that discussions or deliberations, as well as action, on public business shall be conducted openly." *Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147, at p.6 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.).

⁵ By letter dated July 19, 2005, the Town Solicitor requested an "advisory" opinion from our Office whether the draft minutes of the May 23, 2005 executive session (attached to that letter) were a public record under FOIA. By at least July 19, 2005, the Town Solicitor was aware that the Council did in fact discuss the two contracts during executive session. We are confused therefore about the representation in the Town's response to your complaint (dated August 5, 2005) that there was no discussion of the two contracts at the May 23, 2005 executive session.

We determine that the Town Council violated FOIA by meeting in executive session on May 23, 2005 to discuss the status of two contracts for a purpose not authorized by law.⁶

3. Town Hall

In its response to your complaint, the Town did not address this issue, even though the Town has the burden of proof "to justify a decision to meet in executive session." 29 *Del. C.* §10005(c).

In the agenda for the May 23, 2005 meeting, the Town indicated that it met in executive session to discuss "acquisition of property." FOIA authorizes for executive session "preliminary discussions on site acquisitions for any publicly funded capital improvements." 29 *Del. C.* §10004(b)(2). We have previously construed that exemption to "protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller." *Att'y Gen. Op.* 02-IB27 (Nov. 4, 2002).⁷

The minutes of the executive session on May 23, 2005 show that the Town Council did not discuss the acquisition of property but rather the allocation of space in the proposed new town hall

⁶ We do not mean to suggest that FOIA does not offer some protection for the competitive position of a public body engaged in ongoing contract negotiations. FOIA authorizes a public body to meet in executive session to discuss a contract to purchase property (29 *Del. C.* §10004(b)(2)), and to discuss a collective bargaining agreement with a union (*id.* §10004(b)(4)). FOIA also authorizes a public body to meet in executive session to discuss the "content of documents, excluded from the definition of 'public record' in Section 10002 of this title where such discussion may disclose the contents of such documents." 29 *Del. C.* §10004(b)(6). In *Att'y Gen. Op.* 05-IB13 (May 9, 2005), we acknowledged that FOIA may exempt from public disclosure draft contracts that were still being negotiated. "Premature disclosure of draft contracts under negotiation also could compromise the public body's (and the public's) competitive position in those negotiations." *Id.*

⁷ We observed in that earlier opinion that "[a]t some point, after the County has purchased property, the minutes of prior executive sessions regarding the purchase of the property may become subject to FOIA because disclosure would not longer defeat the lawful purpose for executive session." *Att'y Gen. Op.* 02-IB27.

between the police department and administration and council. We determine that the Town violated the open meeting requirements of FOIA because the statute did not authorize the Town Council to meet in executive session to discuss allocation of space in the new town hall.

4. Tax Collections

In its response to your complaint, the Town did not address this issue, even though the Town has the burden of proof "to justify a decision to meet in executive session." 29 Del. C. §10005(c).

The minutes of the May 23, 2005 executive session show that the Council discussed an individual tax delinquent whose property was in foreclosure. We determine that FOIA did not authorize the Town Council to meet in executive session to discuss this matter. The tax matter did not raise any concerns about individual privacy because the taxpayer's property was already in foreclosure, a public process.

5. Personnel Policy Handbook

We determine that FOIA would not have authorized the Town Council to meet in executive session on May 23, 2005 to discuss this matter. Discussion of the handbook would not have come under the "personnel" exception for executive session because it did not involve discussion of the "names, competency and abilities of individual employees." 29 Del. C. §10004(b)(9).

The Town contends that "there was no action or discussion" about the Personnel Policy Handbook at the executive session on May 23, 2005. The minutes of the executive session show that the Council "determined there was nothing pending relating to the Personnel Policy Handbook requiring executive session discussion." Although FOIA applies to discussions where a public body does not take any official action, *see Levy v. Cape Henlopen, supra*, we agree that because the

Council deferred any discussion of the handbook in executive session at that time, the Town did not violate FOIA.

C. Minutes of May 23, 2005 Executive Session

FOIA exempts from public disclosure "any record of discussions held in executive session pursuant to subsections (b) and (c) of Section 10004 of this title." 29 *Del. C.* §10002(g)(10). Section 10004(c), however, provides that minutes of executive session "may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but not longer."

Minutes of executive session "would be exempt from disclosure only if the discussions pertained to a lawful purpose for holding the executive session." *Chemical Industry Council*, 1994 WL 274295, at p. 13. In *Chemical Industry Council*, the Chancery Court held that the state board did not lawfully meet in a series of executive sessions to discuss proposed regulations, but portions of those executive sessions were lawful to the extent the board discussed strategy for potential litigation as authorized by FOIA. "Because no lawful statutory purpose for most of those discussions has been demonstrated, it follows that the Board has not justified withholding the [executive session minutes] of those discussions. Accordingly, the [minutes] must be released to the plaintiffs, after redacting only those portions that specifically concern the Board's litigation strategies." *Id.*

In *Att'y Gen. Op.* 05-IB02 (Jan. 12, 2005), we determined that only those portions of the minutes of the city council's executive session relating to the job performance and proposed salary increase for the city secretary could be withheld from the public under FOIA. The rest of the minutes were a public record because FOIA did not authorize those matters for private discussion and

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therefore disclosure would not "defeat the lawful purpose for which the executive session was called." 29 *Del. C.* §10004(c).

Earlier in this opinion, we determined that FOIA did not authorize the Town Council to meet in executive session to discuss six of the eight matters listed in the minutes of the executive session, but that FOIA authorized the council to discuss in private two personnel matters. We believe that public disclosure of the narrative portions of those two personnel matters would defeat the lawful purpose for which the executive session was called, and should be redacted. The remainder of the minutes of the May 23, 2005 executive session are a public record under FOIA because there was no lawful statutory purpose for discussing those other matters in executive session. *See Chemical Industry Council, supra.*

We determine that the Town violated the public records requirements of FOIA by not providing you with a copy of the minutes of the May 23, 2005 executive session redacted only to exclude the two personnel matters which FOIA authorized the Town Council to discuss in private.

Conclusion

For the foregoing reasons, we determine that the Town violated the open meeting requirements of FOIA by: (1) meeting in executive session on May 23, 2005 to discuss five matters of public business not authorized by law for private discussion; and (2) failing to notice in the agenda for the May 23, 2005 meeting that the Town Council would return to public session after the executive session to discuss and vote on two matters of public business. We also determine that the Town violated the public records requirements of FOIA by not providing you with a copy of the minutes of the May 23, 2005 executive session redacted only to exclude two personnel matters in which the Town Council discussed the abilities and competency of individual employees.

As remediation, we direct the Town to provide you with a copy of the minutes of the May 23, 2005 executive session (redacted consistent with this opinion) within ten days of the date of this letter. For the open meeting violations, we direct the Town to notice and hold a meeting in compliance with FOIA within thirty days of the date of this letter to discuss the following matters of public business: the first item discussed in executive session on May 23, 2005 (zoning and compliance issues); and the two matters discussed after the executive session but not noticed in the agenda for the meeting (zoning letters, and limitation of agenda items).⁸

⁸ We do not believe that the Town needs to remediate the other matters unlawfully discussed in executive session on May 23, 2005 because: (1) they were informational only (status of two contracts; allocation of new town hall space; tax delinquent); or (2) were deferred for future discussion (personnel policy handbook).

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We direct the Town Solicitor to notify us in writing within ten days after the Town has completed remediation.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

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cc: The Honorable M. Jane Brady
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